does not seem to be superfluous to note this, because there is ground for anxiety in the fact that Fustel de Coulanges is beginning to obtain a following in Germany for his scientific system that rightly opposes the Babylonian tower of brilliant conjectures, but that from the very beginning shuts out every appreciation for the continuity of the development of legal history by condemning as unmethodical even the attempt to strive for it."

RECENT CASES.

ADMIRALTY — MARITIME LIENS. — *Held*, that a stevedore rendering services in loading or unloading cargo in other than the home port has a maritime lien therefor.

The Ilex, 2 Woods, 229, is overruled, and the rule on other circuits followed. The services of the stevedore are of a maritime character, and when performed for a vessel in a foreign port are not rendered upon the personal credit of the owner, and the stevedore is as much entitled to a lien as a person who loans money to the ship-master to pay the stevedore. *The Main*, 51 Fed. Rep. 954 (C. Ct. of App., La.).

CARRIERS — RAILROAD TICKETS — TRANSFERABILITY. — Where a railroad coupon ticket for passage over different roads was sold by one company as principal as to its own line, and as agent as to the other roads, at a reduced rate, and subject to the stop-over regulations of the different roads, but without any stipulation as to a continuous passage, or against its transfer, — *Held*, that the contract was not entire, but severable; and though the passage on any one road would have to be continuous, and by one holder, yet the ticket could be assigned at the end of any line, and would be good for the remainder of the journey in the hands of the transferee. *Nichols* v. *Southern Pacific Co.*, 31 Pac. Rep. 296 (Oregon).

This is in accord with *Hoffman* v. *Railroad Co.*, 45 Minn. 53.

CONSTITUTIONAL LAW — MANNER OF CHOOSING PRESIDENTIAL ELECTORS. — Public Acts of Michigan, 1891, No. 50, provide for choosing presidential electors by congressional districts instead of by all the people on one ticket. *Held*, that it is a question for the court whether such method of electing is constitutional. *Held*, also, that the method prescribed in said Act is constitutional. U. S. Const. art. 2, § 1, gives to the State legislatures full power to determine the mode of appointing electors. The fact that for many years it has been the custom to choose electors on a single ticket has not deprived the legislatures of the power originally given them. The fourteenth and fifteenth amendments to the Constitution are not violated by the law in question. The decision of the State court (52 N. W. Rep. 469) is affirmed. *McPherson et al.* v. *Blacker, Secretary of State*, 13 Sup. Ct. Rep. 3.

CONSTITUTIONAL LAW — POLICE POWER — COAL WEIGHING ACT. — A statute required operators and owners of coal mines, where the miner is paid on the basis of the amount of coal mined by him, to weigh the coal on pit cars before it is screened, and to compute the compensation on the weight of the unscreened coal. *Held*, that the statute was unconstitutional, because it deprived persons, without due process of law, of the property right of making contracts. *Ramsey* v. *People*, 32 N. E. Rep. 364 (Ill.).

This decision is in direct conflict with the recent case of *Peel Splint Coal Co.* v. *State*, 15 S. E. Rep. 1000 (W. Va.); but it carries out the reasoning of the mass of previous authority. Cf. *Frorer* v. *People*, 31 N. E. Rep. (Ill.), and cases there cited.

CONSTITUTIONAL LAW — TRIAL BY JURY OF LESS THAN TWELVE. — Under a provision of the Constitution that "the right of trial by jury shall remain," and that "the legislature may authorize a trial by a jury of a less number than twelve men," — *Held*, that an Act providing that after the impanelling of a jury, if from death, sickness, or any other cause any of the jurors should be unable to attend, the court might enter that fact on their journal, and the proceeding should then continue in the same manner and with the same effect as if the whole panel was present, was unconstitutional, as delegating to the court a discretion vested in the legislature. McGrath, C. J., and Montgomery, J., *dissent*. *McRae* v. *Grand Rapids L. & D. R. Co.*, 53 N. W. Rep. 561 (Mich.).

The decision seems unnecessarily strict. The legislature can hardly be said to

delegate discretion to the trial court, and there is nothing peculiar to the nature of a jury making a trial by less than the number of jurors impanelled an impossibility.

CONTRACTS — ABANDONMENT OF CONTRACT. — *Held*, that conduct of the defendant evincing his intent not to be bound by a contract, although it justified the plaintiff in treating the contract as rescinded, did not entitle him also to sue for future profits. Plaintiff could recover only the value of services actually performed, on *quantum meruit*. *Lake Shore & M. S. R. R.* v. *Richards*, 32 N. E. Rep. 402 (Ill.).

The court follow *United States* v. *Behan*, 110 U. S. 338, and the cases there cited.

CORPORATIONS — CONTRACT BY CITY FOR BENEFIT OF SOME OF ITS CITIZENS. — A city contracted with a railroad company not to oppose before the railroad commissioners certain changes which the railroad company desired to make in its line. The consideration for the contract was the promise by the railroad to pay to owners of property upon streets which the new line should cross such damages as arbitrators should award them. *Held*, that a contract made by a city in consideration of benefit to private individuals is void, because against public policy, and cannot be enforced by the city. *City of New Haven* v. *New Haven and Derby R. R. Co.*, 25 Atl. Rep. 316 (Conn.).

CORPORATIONS — ULTRA VIRES — PURCHASE OF ANOTHER CORPORATION. — Plaintiff, an Ohio corporation, bought up all the shares of a Tennessee corporation of which the defendant was president, for the purpose of controlling it. Part of these shares were bought of the defendant under a contract by which he became liable for one half any amount it might be found necessary to pay in satisfaction of claims against the company. In an action for this amount it was *held* (1) that the contract for purchase of the stock was void, as being outside the object of the plaintiff company. The fact that the two companies were engaged in the same business does not prevent the purchase being *ultra vires*. (2) Since an *ultra vires* contract is absolutely void, the defendant can set up this defence, though the contract has been performed, and he has received the benefit of it. *Buckeye Marble Co.* v. *Harvey*, 20 S. W. Rep. 427 (Tenn.).

CRIMINAL LAW — INSANITY — BURDEN OF PROOF. — When the defence of insanity is introduced in a criminal trial, the prosecution must establish beyond a reasonable doubt the sanity of the accused. *Armstrong* v. *State*, 11 So. Rep. 618 (Fla.).

The American courts are very evenly balanced on this question. *Chase* v. *People*, 40 Ill. 352, *State* v. *Bartlett*, 43 N. H. 224, *accord.*; *Pannell* v. *Com.*, 86 Penn. 260, *State* v. *Lawrence*, 57 Me. 574, *contra.*

CRIMINAL LAW — INTERSTATE EXTRADITION — POWER TO TRY FOR DIFFERENT CRIME. — A person brought into New York by extradition proceedings to answer a charge of grand larceny may be rearrested and tried upon a charge of robbery growing out of the same facts. 19 N. Y. Supp. 271, affirmed (see 6 HARVARD LAW REVIEW, 158). *People* ex rel. *Post* v. *Cross*, 32 N. E. Rep. 246 (N. Y.).

Authorities on this subject are much divided. In *People* v. *Rauscher*, 119 U. S. 407, it was held that a person extradited from Great Britain for murder of a seaman could not be tried for the statutory offence of cruel and inhuman punishment of the same seaman. The New York court distinguish that case on the ground that it would have been a violation of good faith for the United States to try the prisoner for an offence not within the extradition treaty with Great Britain; and such a course, moreover, was expressly forbidden by Act of Congress. The court suggest that a different rule applies as between States, their mutual obligation to surrender criminals springing from a provision of the United States Constitution (art. 4, § 2), which expressly includes all crimes. In the case at bar no principle of comity was violated, because the State from which the prisoner was brought had already held the same doctrine as that now laid down for New York.

CRIMINAL LAW — WRIT OF ERROR — ABATEMENT BY DEATH. — O, having been convicted of murder, brought error; after argument and before judgment O died. *Held*, that the writ of error abated; and also that the court could not enter judgment *nunc pro tunc*, because the only subject-matter on which judgment could operate had ceased to exist. *O'Sullivan* v. *People*, 32 N. E. Rep. 192 (Ill.).

This is in accordance with the only case directly in point (53 Ga. 552), and with Mr. Bishop's conjecture in 1 Crim. Proc. § 1363. In civil cases, and in England where a criminal conviction works attainder, the opposite rule obtains.

EQUITY — MISREPRESENTATION — PROSPECTUS OF COMPANY. — B signed a printed form issued by the promoters of an intended company, expressing his willingness to become a member of the council of administration of the intended company. Soon afterwards, when the scheme had been more fully matured, the promoters issued a prospectus,

in which the company was described as "to be incorporated under the Companies' Act;" an extract was also given from the proposed articles of association to the effect that there would be a council of administration of members of the company, and a list of members of the council was appended, containing the name of B. This was done on the one hand without any further communication with B, but on the other without any withdrawal having been made by him of his name. B afterwards refused to have anything to do with the scheme. Plaintiff, who bought shares on the faith of the statement in the prospectus, brings a bill to have his name stricken from the list of contributors, and to have his money refunded. *Held*, that the effect of the statement in the prospectus was not merely that B had expressed his willingness to become a member of the council, but that he had authorized the publication of his name as a member, and as such was a false statement of fact. Decree for plaintiff. *Karling's Case*, [1892] 3 Ch. 1 (Eng.).

GUARANTY — APPLICATION OF COLLATERAL. — A debt payable in instalments was secured to its whole amount by insurance policies on certain buildings for the benefit of the creditor, and also by the guaranty of a third person for the part first due. *Held*, that the creditor had a right to hold the insurance money paid when the buildings were burned, as security for the part of the debt not covered by the guaranty, although not yet due, and that the guarantor was liable for the unpaid instalments covered by his guaranty. *Kortlander* v. *Elston*, 52 Fed. Rep. 180 (C. Ct. of App., Sixth Circuit).

QUASI-CONTRACTS — ACTION AT LAW TO ENFORCE TRUST OF MONEY — PAROL EVIDENCE. — Plaintiff conveyed money to his father, defendant's testator, by a deed absolute on its face; but there was an oral understanding that the testator should hold for safe keeping only, and subject to plaintiff's demand. *Held*, in an action of law, in the nature of a count for money had and received, that plaintiff could prove these facts by parol evidence. *Minchin* v. *Minchin*, 32 N. E. Rep. 164 (Mass.).

Defendant objected that this was varying a deed by parol evidence. The court say that the action is in effect brought to enforce an express trust of money; that as the right is really equitable, the rules of equity in regard to the admission of evidence ought to prevail; and that equity does not regard such evidence as varying the deed, but as setting up an equitable title not inconsistent with the legal title passed by the deed. An action at law would, of course, not have lain at all (*Davis* v. *Coburn*, 128 Mass. 377) if there had been a trust account still remaining open in any proper sense. Here by express agreement the trust terminated, and the trustee became liable to redeliver the *res*, upon a simple demand by plaintiff.

REAL PROPERTY — CONSTRUCTION OF RAILROAD — OVERFLOWING LANDS. — A railroad company constructed a ditch which diverted a large quantity of surface water from the direction in which it naturally flowed, and turned it into a watercourse which was thereby made to overflow plaintiff's land. *Held*, that railroad companies acquire no greater rights than individuals, and therefore defendant was liable for the damage done to plaintiff. *Staton* v. *Norfolk & C. R. R. Co.*, 16 S. E. Rep. 181 (N. C.).

The weight of authority seems to be that the railroad purchases once and for all the right to operate its road, and that it is not liable for subsequent damage arising from works carefully constructed in the course of the operation of the road, although such a result could not have been foreseen when the damages were assessed. Lewis: Eminent Domain, §§ 564 *et seq.*

REAL PROPERTY — DOWER — DEDICATION. — Plaintiff's husband conveyed land to defendant for a right of way, plaintiff not joining in the deed. In an action for dower, it was *held* (1) that a railroad is a public highway, though operated for profit, and that land acquired by it for a right of way, either by voluntary deed as here, or by the exercise of the right of eminent domain, is dedicated to public uses; (2) that the grantor's widow has no right of dower in land dedicated to public uses. Black, J, *dissents*. *Venable* v. *Wabash Western R. R. Co.*, 20 S. W. Rep. 493 (Mo.).

This is the first case in Missouri to decide this point.

REAL PROPERTY — JOINT TENANCY FOR LIFE WITH REMAINDERS SEVERALLY IN FEE. — A testator gave real and personal estate to trustees in trust for his "nephews J., T., and G., and for their respective heirs, executors, administrators, and assigns." *Held*, that the nephews were joint-tenants for their lives and the lives of the survivors and survivor, with several remainders in tenancy in common in fee. *In re Atkinson-Wilson* v. *Atkinson*, [1892] 3 Ch. 1 (Eng.).

This is a very curious case, which can be traced back to Lit. § 283, and which is the outcome of the limited application of the rule in *Shelley's Case*, and of the presumption of joint-tenancy. The result is worked out as follows: —

I. *Shelley's Case.* — "Heirs" cannot be a word of limitation, but must be taken as

a word of purchase, except when it is used as designating the heirs of the one, or, where two, the heirs of the two between them begotten, to whom the immediate estate is given. Thus, if an estate is given to a woman and the heirs of her and A B (as distinguished from the case where an estate is given to her and A B and the heirs of their two bodies), she takes, not an estate tail, but merely an estate for life. *Per* Wilmot, C. J., in *Frogmorton* v. *Whaney*, 2 W. Bl. 728, 731. See Fearne C. R. 38; 2 Jarm. Wills (4th ed.), 340–343.

II. Suppose, then, an estate be given to two *men*, A and B, and to the heirs of their two bodies begotten. By the presumption of joint-tenancy this gives an immediate joint estate to A and B; but heirs of the bodies jointly of A and B, who are the takers of the immediate estate, is an impossibility; "heirs of their two bodies begotten" is, therefore, interpreted as meaning the heirs begotten by each of them of his body by any wife. But then "heirs" cannot be taken as a word of limitation (*supra*), but A and B are held to have a joint estate for the term of their two lives, with remainders severally to their heirs as tenants in common. Lit. § 283.

Now, if the land is given to "A and B and their heirs," the case is held not to differ, for A and B have the immediate interest in joint-tenancy, and as "heirs" is clearly not intended to be restricted to such persons as may be the heirs of both jointly, the rule in *Shelley's Case* does not apply. A and B have a joint life estate as above, with inheritances severally to their heirs general as tenants in common.

III. Then, to come to the present case. "*Respective*" put before "*heirs*" is held in no way to change the situation, for it merely makes the *inheritances* several as *they were before*, and does not affect the joint holding of A and B.

It will be seen that the keystone of the reasoning is the joint holding of A and B. The case seems, therefore, to have no application in jurisdictions where the presumption of joint holding is changed, or where such language is used as to rebut the presumption. *Ex parte Tanner*, 20 Beav. 374 (*semble*), where the Master of the Rolls says, if the wording were "to A and B and the heirs of their bodies respectively," instead of "A and B and their respective heirs," A and B would take as tenants in common in tail.

REAL PROPERTY — RIGHT TO LATERAL SUPPORT. — A municipal corporation, in the course of grading a street, negligently made excavations so that the lateral support to the land of the abutting owner was removed, the soil was caused to slide into the street, and the buildings situated on the land were damaged. *Held*, that the city was liable (1) for the damage to the soil, and (2) for the damage to the buildings, since the weight of the buildings did not contribute to the caving in of the soil. *Parke* v. *City of Seattle*, 31 Pac. Rep. 310 (Wash.).

The court cites, and expressly dissents from, Dillon, Municipal Corporations, § 991, where it is said that "the abutting owner has, as against a city, no right to the lateral support of the soil of the street, and can acquire none from prescription or lapse of time," and follows *Keating* v. *Cincinnati*, 38 Ohio St. 141, and *Stearns' Ex'r* v. *City of Richmond*, 14 S. E. Rep. 847 (Va.).

TORT — ANIMALS KILLED ON RAILROAD. — In a recent case in Massachusetts it is said that "the mere fact that the plaintiff's horse escaped from his control, and passed through the gate of the defendant's tracks, did not make him a trespasser so as to preclude the plaintiff from recovery." *Taft* v. *New York P. & B. R. R. Co.*, 32 N. E. Rep. 168 (Mass.).

While it is clear that such a fact should not, of itself, preclude recovery, it is not equally clear that the inability of the master to control his horse will prevent the latter from becoming a trespasser if he enters on the premises of a stranger. The language may, however, be explained on the ground that the court is trying to avoid the consequences of the unfortunate decision in *Maynard* v. *B. & M. R. R.*, 115 Mass. 458.

In Massachusetts the leading case of *Holmes* v. *Drew*, 151 Mass. 578, has been properly criticised, and can only be supported on the ground that there was an implied invitation, — an assumption not sustained by the facts. Nor is the decision in *Sweeny* v. *Old Colony &c. R. R.*, 10 Allen, 368, altogether satisfactory, though it is far less objectionable than the verdict of the jury. A clear distinction should be made between a recovery on account of the condition of the premises and a recovery based on the application of actual force to the person of the trespasser or licensee.

TORT — CARRIER OF PASSENGERS — LIABILITY TO TRESPASSER. — Plaintiff was stealing a ride on defendant's train, when defendant's brakeman saw him and ordered him to get off. Plaintiff protested that the train was moving too rapidly; but the brakeman insisted, and threatened to throw plaintiff off if he did not immediately jump from the train. Plaintiff jumped, and fell under the cars, sustaining severe injuries.

Held, plaintiff could not recover, because he was guilty of contributory negligence in being on the train when he knew he had no right there; for it was his consciousness of having done wrong that made him fear the brakeman's threats, and caused him to jump from the train. *Planz* v. *Boston & Albany R. R.*, 32 N. E. Rep. 356 (Mass.).

It is submitted that the injury here was the result of a wilful, not of a negligent, act of the defendant's servant; negligence of the plaintiff was therefore entirely immaterial. Beach, Contrib. Negligence, § 22. Moreover, if the defendant wrongfully compelled the plaintiff to adopt a perilous alternative, he was responsible for the consequences, even if the plaintiff, in his terror, made a reckless choice. Beach, Contrib. Negligence, § 14. The court's reasoning as to the causal influence of the plaintiff's conscience is decidedly novel.

TORT — DANGEROUS PREMISES — INJURIES TO MERE LICENSEE. — *Held*, that a statute which gives the members of a fire patrol the right to enter buildings exposed to fire, does not give them any greater rights than those of mere licensees. *Held*, also, that where a fireman enters a building by reason of such statute, and is injured while using an elevator so constructed as to show it is intended for freight, he cannot recover, for there is no implied invitation to use the elevator. *Gibson* v. *Leonard*, 32 N. E. Rep. 182 (Ill.).

The decision in this case is undoubtedly correct, for the license was given by law, and there was no enticement, allurement, or invitation on the part of the owner of the building.

The authorities on the general subject of the duty of care towards licensees are in confusion. In *Indemaur* v. *Dames*, L. R. 1 C. P. 274, there was a legal "invitation," though in ordinary speech one would say the plaintiff had entered the sugar refinery "on business." And on the other hand there is the case of *Southcote* v. *Stanley*, 1 H. & N. 247, in which it was held that no "invitation," legally speaking, was extended to the plaintiff, who had come as a "visitor" of the defendant.

TORT — EXTRAORDINARY CARE — ELECTRIC RAILROAD. — In an action against an electric street railway company for personal injuries sustained by the plaintiff while a passenger in one of the company's cars, the judge charged the jury that the defendant was liable if the injury could have been avoided by extraordinary care and vigilance on the part of the defendant, its agents and employees. *Held*, that the instructions were unexceptionable; that an electric railway company should be held, not merely to the degree of care required of horse-railway companies, but to the extraordinary degree of care which is required of steam-railroad companies. *Cogswell* v. *West St., &c., Electric R. R. Co.*, 31 Pac. Rep. 411 (Wash.).

TORT — MUNICIPAL CORPORATION — LIABILITY FOR NEGLIGENCE OF OFFICER. — Plaintiff was imprisoned in the workhouse to work out a fine imposed for infraction of the city ordinance, which was enacted by virtue of power given by the city charter. While there, acting under orders of the workhouse superintendent, he was kicked by a mule, known to be vicious, which he was attempting to harness. *Held*, that the defendant city was "simply in the exercise of its governmental functions, and not liable for the negligence of its officers." *Ulrich* v. *City of St. Louis*, 20 S. W. Rep. 467 (Mo.).

TORT — STREET RAILWAY — ADVERTISING ATTRACTIONS. — Defendant, a street railway company, owned a pleasure resort to which it ran cars, and published a description of the grounds and attractions, stating that a roller-coaster was being built there. *Held*, that the plaintiff could not recover against defendant for injuries caused by negligence of the owner of the roller-coaster. Defendant's granting to the owner of the coaster permission to operate a coaster, which in itself was not dangerous, was not negligence, nor did his advertisement make him liable. *Knottnerbus* v. *North Park St. Ry. Co.*, 53 N. W. Rep. 529 (Mich.).

TORT — TELEGRAM — MISTAKE. — Plaintiffs were damaged by the negligence of defendant's agent in substituting the figures "47" for "27" in an unrepeated message. The message was written on a blank, with the stipulation upon it that the company would not be liable for damages caused by mistake, unless the message was repeated. *Held*, that this stipulation was void. Overruling *Lassiter* v. *Tel. Co.*, 89 N. C. 334; *Brown* v. *Postal Telegraph Co.*, 16 S. E. Rep. 179 (N. C.).

TRUST, SPENDTHRIFT — LIABILITY OF INCOME TO EXECUTION. — A, by will, gave property to trustees in trust for a son of A, with remainder to the trustees. The trustees were directed to invest the money and rent the land, and "to use the rents and interest for support of the son during his life, making quarterly payments to him until death." *Held*, that the interest of the beneficiary to the extent of his comfortable sup-

port and maintenance, according to his condition in life, was not liable to seizure for his debts. But any accumulation above the sum needed for the beneficiary's support is liable for his debts. *Leigh* v. *Harrison*, 11 So. Rep. 604 (Miss.).

This is an extraordinary decision. Even admitting the soundness of the doctrine of so-called spendthrift trusts, the decision in this case goes further in three respects. 1. The direction in the will to pay over the whole income was absolute, and not discretionary, as in *Nichols* v. *Eaton*, 91 U. S. 716, the case cited as the chief authority for the decision; nor was it a direction to provide for the maintenance of the son, as in *Re Bullock*, 54 L. T. N. S. 736. The will contained no direction that the income should not be liable for debts, as in *Fisher* v. *Taylor*, 2 Rawle, 33. 3. The decision was reached, notwithstanding a provision in the code that estates of any kind held for another "shall be subject to like debts and charges of the person to whose use" they are held, as they would have been if the person had owned a like interest therein "as he may own in the uses or trusts thereof."

REVIEWS.

THE HISTORY OF THE DOCTRINE OF CONSIDERATION IN ENGLISH LAW (Yorke Prize Essay for 1891). By Edward Jenks, M. A. London: C. J. Clay & Sons. 1892.

This little book is very suggestive, and well worth the attention of any one who cares for the history of the law. The first chapter (by means of twelve canons) gives a statement of the condition of the law at the present day. A desire to be methodical leads to the mistake here of introducing as canons what should be treated as exceptions rather than independent and co-ordinate principles. It is rather surprising to read at the outset a defence of the theory that consideration may be regarded as a benefit conferred on the promisor, and that consideration to-day is a matter of procedure rather than of substantive law. Indeed, the latter statement is subsequently contradicted.

The next two chapters treat of the law during the time of the Abridgments and earlier; while the last chapter is a chronological recapitulation down to the present day.

In brief, Mr. Jenks states that the action of assumpsit developed from actions of tort through the action on the case; and that the *breach* was the prominent feature, — not the *undertaking*, which was treated merely as an incident. The necessity of consideration was carried over from the action of debt, and grew from a mere point in procedure to an essential element of the contract. "On the whole," he says, "the great interest of the subject lies in the fact that it affords perhaps the best instance in the domain of legal biology of an unconscious adoption of a rudimentary and apparently casual organ to important and complex purposes."

G. R. P.

UNITED STATES CIRCUIT COURT OF APPEALS, Vol. I. St. Paul: West Publishing Co., 1892.

This series of reports covers the same ground as the official series published by Banks & Brothers. The reports and headnotes are made by the "Editorial Staff of the National Reporter System." How they compare in accuracy and completeness with the authorized reports only a detailed examination would show. The volume is rather cheaply got up, with narrow margins and small type. N. H.